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ATTORNEY GENERAL

Office of the Attorney General
State of Texas

August 15, 1991

Mr. Wayne Blevins
Executive Secretary
Teacher Retirement System of Texas
1001 Red River Street
Austin, Texas 78701-2698

Open Records Decision No. 593

Re: Whether information about the Teacher Retirement System's investment in a building is excepted from disclosure under section 3(a)(4) of the Open Records Act, article 6252-17a, V.T.C.S. (RQ-10)

Dear Mr. Blevins:

You have requested our decision as to whether certain information regarding the Teacher Retirement System's (hereafter TRS) investment in a building is excepted from disclosure under sections 3(a)(4) or 3(a)(1) of the Open Records Act, article 6252-17a, V.T.C.S.

On December 28, 1990, this office issued Open Records Letter Ruling OR90-593 (1990), which dealt with a request you had received for a number of items relating to information about a participating first mortgage loan made to the developer of an office building in Little Rock, Arkansas, bearing the name TCBY Tower. The decision held that certain of the requested information was excepted from disclosure by sections 3(a)(10) and 3(a)(11) of the Open Records Act, but invited further briefing regarding the validity of your claims under sections 3(a)(1) and 3(a)(4). The decision declared:

It appears, without so deciding, that the relationship of the Teacher Retirement System to private enterprise may present a situation in which a governmental entity has interests in the marketplace which have not been hitherto considered in open records decisions. Similarly, your assertion of a fiduciary duty as a basis for exception under section 3(a)(1) presents a case of first impression.

Open Records Letter Ruling OR90-593 at 6.

Section 3(a)(4) is designed to protect governmental interests in commercial transactions. It has most often been applied to competitive bidding situations prior to the award of a contract. *See, e.g.,* Open Records Decision Nos. 541 (1990); 514 (1988); 463 (1987). Nevertheless, it has been frequently stated that the exception is available when a requestor is able to demonstrate the possibility of some specific harm in a particular competitive situation. *See* Open Records Decision Nos. 541 (1990); 520 (1989); 331 (1982). On occasion, however, this office has declared that a governmental body may not be deemed a "competitor" for purposes of section 3(a)(4). In Open Records Decision No. 463 (1987), for example, the attorney general said:

Although section 3(a)(4) protects governmental interests by assuring that the competitive bidding process will be truly competitive, it may not be claimed to protect a governmental body's 'competitive advantage' because they cannot be regarded as being in competition with private enterprise.

In our opinion, this statement is overly broad.¹ There are certain situations, such as that presented here, in which a governmental body may properly be deemed a "competitor."

TRS is established under the terms of article XVI, section 67, of the Texas Constitution, which provides, in pertinent part:

(a) General Provisions. (1) The legislature may enact general laws establishing systems and programs of retirement and related disability and death benefits for public employees and officers. Financing of benefits must be based on sound actuarial principles. The assets of a system are held in trust for the benefit of members and may not be diverted.

¹Recently, in Open Records Decision No. 568 (1990), this office seemed to recognize that a governmental body *might*, under certain circumstances, be deemed a competitor for purposes of section 3(a)(4). That decision states:

No showing has been made that the release of the requested information will harm the treasury's interests in the marketplace.

Implicit in this statement is the presumption that the State Treasury, and by inference *any* governmental body, might be considered to have marketplace interests.

....

(3) Each statewide benefit system must have a board of trustees to administer the system and to invest the funds of the system in such securities as the board may consider prudent investments. In making investments, a board shall exercise the judgment and care under the circumstances then prevailing that persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income therefrom as well as the probable safety of their capital. The legislature by law may further restrict the investment discretion of a board.

The TRS board of trustees has made a determination that disclosure of certain portions of the requested information "is likely to cause harm to the trust asset." We turn first to a demonstration of whether TRS has marketplace interests that may be subject to protection under section 3(a)(4).

Article XVI, section 67, creates a fiduciary relationship between members of the TRS and its board of trustees. *See generally* Gov't Code ch. 825. The constitution declares that the board shall "invest the funds of the system in such securities as the board may consider prudent investments." In the situation presented for our review, TRS is acting in the capacity of a lender.² We will summarize the position TRS has adopted in arguing that it has marketplace interests in transactions such as that under consideration here:

1. TRS had to compete for the loan with, and in the same manner as, various private lenders;
2. Because the loan requires payment to TRS of a percentage of cash flow, TRS has an on-going interest in the performance of the property;

²We assume, for purposes of this decision, that the TRS loan under consideration complies with both constitutional and statutory requirements applicable to TRS investments.

3. TRS, in its role as fiduciary, must closely monitor the loan; such monitoring may require on-going decisions regarding approval of lease provisions, renegotiation of loan provisions, or possible foreclosure; disclosure of information regarding such financial transactions would affect those negotiations, possibly to the detriment of TRS;

4. Because of the nature of the loan, TRS's interests are sometimes congruent with and sometimes adverse to those of the borrower;

5. TRS must continually evaluate new investment opportunities; disclosure of information regarding the various financial transactions involved here might discourage future borrowers from dealing with TRS;

6. Because of the nature of the loan, TRS has a continuing competitive interest in the commercial rental market in Little Rock, and TRS must operate within this competitive environment.

In summarizing its position regarding its marketplace interests, TRS states the following:

If, in enacting Section 3(a)(4), the legislature was concerned . . . about a state agency's ability to preserve its competitive position when purchasing \$20,000 in office furniture, surely it intended to preserve the on-going competitive position of an agency that has a \$65 million investment.

In our opinion, this view is correct. Prior decisions which stated categorically that a governmental body could not be deemed to compete with private enterprise did not consider governmental entities that had specific constitutional and statutory authority to engage in such competition. Where competition is authorized by law, we believe that a governmental body must be afforded the right to claim the "competitive advantage" aspect of section 3(a)(4). Prior rulings and decisions that hold to the contrary are overruled to the extent of conflict. In particular, Open Records Decision Nos. 463 (1987), 231 (1979), 153 (1977), and 99 (1975) are overruled.

We next turn to the question of whether release of the information in question could potentially cause specific harm to the legitimate marketplace interests of TRS. Certain aspects of such harm have already been alluded to in our previous discussion of the marketplace interests of TRS. We will now briefly address the question of "harm" in four specific areas suggested by TRS: current account balances, letter of credit draws, correspondence, and appraisals.

You have marked certain information which you wish to withhold in four particular categories. The first of these is described as "current account balances." You state:

1. The information reveals the project's operating conditions and remaining amounts of operating cash for the project. It could be used by competitors of TCBY Tower to project what incentives TCBY Tower is financially able to offer to new tenants and then to make a better lease offer. General information about operating conditions could be used by competitors to approach existing TCBY Tower tenants or win future tenants.
2. Information on what has already been spent on tenant finish could be used by future potential tenants in their negotiations with TCBY Tower.
3. The remaining balance figures are particularly revealing of the borrower's position, though the original balances also provide information that would not normally be available and could provide competitive advantage when combined with information that could be pieced together from other sources.
4. Revealing information on operating conditions, tenant finish and leasing commission escrow, project escrow, and the current letter of credit balance gives competing properties and tenants information they would not normally have and could cause the project to lose tenants, fail to secure new tenants, or have a weakened bargaining position when entering into leases. All of the results would affect TRS, since payments to TRS depend on the ability of the project to secure rent payments and, in the case

of the participating interest of TRS, to generate a positive cash flow.

Two exhibits contain information regarding the second category: letter of credit draws, remaining balances, and related information. You indicate:

1. The same harm previously discussed with respect to the account balances could result from disclosure of the letter of credit information.
2. The information in Exhibit E(7) presents a detailed picture of what TCBY Tower has spent on behalf of different tenants, other recurring expenses, and cash available. Again, this information puts specific, current financial information into the hands of other competing office buildings and current or potential tenants. The records provide them with information they would not normally have and that they could use as a competitive or negotiating tool.
3. The information in Exhibit E(6) and (7) reveals the borrower's current financial and operating conditions. A lender such as TRS would not normally reveal such information about the borrower to the public because of the repercussions that disclosure would cause for both the borrower and lender. Tenants, other competing office buildings, and other creditors of the borrower could base business decisions on this type of information if they had access to it. Disclosure would put the borrower and, consequently, TRS at a competitive disadvantage in the leasing marketplace.

Portions of two other exhibits contain correspondence that you claim would harm the competitive position of TRS. You state:

1. The marked parts of the documents reveal level of concern, strategies for response, and other information about action taken by the Resolution Trust Corporation (RTC) regarding a letter of credit. They reveal information concerning enforcement of the loan provisions by TRS. They also contain financial information that reveals the borrower's financial status.

2. All of this information is of the type that a lender would not reveal to the public since disclosure could affect the ability of both the lender and borrower to reach agreement on issues. Disclosure could needlessly raise concerns of other creditors and increase financial pressures on the borrower, which could in turn affect the income stream from the borrower to TRS. Tenants or potential tenants could become unduly alarmed about a situation that the borrower and lender could resolve without harm to the tenants. Competitors could tout the RTC-induced situation as reason to rent from them.

3. Especially with the loan currently under renegotiation, the negotiating position of TRS may be damaged by release of correspondence that provides insight into its decision-making process in a similar situation.

4. Further, if TRS is required to disclose such information, the potential for disclosure of similar correspondence for other real estate loans could affect whether and when TRS takes steps such as those indicated in the letters.

In the final category of information, you seek to withhold the opinion portions of appraisals and that material which is based on the borrower's records. You indicate:

1. Page 12 of Exhibit D(2) indicates the opinion of the advisor on what properties in Little Rock, Arkansas, are considered to be comparable rental property. . . . The following eight pages contain photographs and other factual information about the properties that are, in the advisor's opinion, comparable rental property. TRS cannot disclose much of the factual information about the properties, including the photographs, without disclosing the opinion of the advisor on which properties are comparable rentals to TCBY Tower. The factual and opinion parts of the document are practically inseparable.

2. Further, disclosure of this information would be equivalent to providing tenants and competitors with a handbook on shopping for space in Little Rock. TRS, through its advisor, has compiled

the data for its own internal use, not for the public's use. TRS has expended its own resources in contracting with the advisor for such information. The information has commercial value to both TRS and the appraiser who compiled this background information. Releasing the information to the public would allow both tenants and competitors to reap the benefit of a TRS expenditure made to serve the interests of the trust beneficiaries, not the interests of the public. Tenants could use the information to extract concessions from TCBY Tower or to decide to move because of what looks like a better package deal. Competitors also could use the compiled information to attempt to lease their space to current or potential TCBY tenants by using a point by point comparison of features. Further, disclosure would allow other lenders to evaluate their borrowers' properties without expending the same resources that TRS and its advisors have spent in compiling such comparisons.

3. Release of this type of appraisal information to the public could have a negative effect on the ability of TRS to hire qualified appraisers in the future. . . . The appraisers hired by TRS may refuse new assignments or charge a premium rate to compensate for the loss of commercial value of its work product due to disclosure.

4. TRS has over fifty funded real estate projects around the country and regularly receives appraisals from either the investment advisor assigned to the property or from an outside appraisal company. TRS will seek appraisals for TCBY Tower and other properties on a recurring basis. Thus, TRS must be able to attract quality professionals who are familiar with and thoroughly research the market and who then provide a comprehensive report to TRS. Disclosure of market data will harm the ability of TRS to obtain comprehensive appraisals in the future.

We are persuaded by your arguments that disclosure of the information at issue could, and indeed would be likely to, cause specific harm to the legitimate marketplace interests of TRS. Accordingly, you may withhold from public disclosure the information in question here, in its entirety, on the basis of section 3(a)(4) of the Open Records Act. Since it is our decision that you may withhold this material under section 3(a)(4), we need not address your concerns under section 3(a)(1).³

³We take note of section 825.107 of the Government Code, which relates to the record keeping duties of the Board of Trustees of the Teacher Retirement System. That section provides in relevant part:

(b) The board shall keep a record of all of its proceedings.

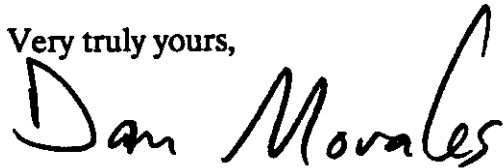
(c) Except as otherwise provided by this title, records of the board are open to public inspection.

Although subsection (c) appears to be a broad public access provision relating to all records of the board, we believe that this language has been transmogrified, by nonsubstantive recodifications, into its present form. In 1969, this language read: "The State Board of Trustees shall keep and open to public inspection a record of all of its proceedings." Acts 1969, 61st Leg., ch. 41, § 1, at 126. In a 1981 nonsubstantive revision, title 110B was added to the Revised Civil Statutes of 1925. Section 25.107 of that revision then replaced the above referenced language regarding records of the board of trustees. It provided: "The board shall keep a record of all of its proceedings. Records of the board are open to public inspection." Acts 1981, 67th Leg., ch. 453, § 1, at 1919. Finally, in 1989, section 825.107 of the Government Code was enacted in its present form. Acts 1989, 71st Leg., ch. 179, § 1, at 777. The 1989 legislation states that it "is intended as a recodification only, and no substantive change in the law is intended by this Act." *Id.* § 3; see also Acts 1981, 67th Leg., ch. 453, § 1, at 1878 (section 1.001 of title 110B provides that no substantive change in the law is intended). It is well settled that the courts will look to the prior enactments to construe provisions of a nonsubstantive revision of the law. *Bryant v. Metropolitan Transit Auth.*, 722 S.W.2d 738 (Tex. App.--Houston [14th Dist.] 1986, no writ); *Lower Colorado River Auth. v. Texas Dep't of Water Resources*, 689 S.W.2d 873, 876-78 (Tex. 1984). Language that is substantially the same as that of a former code or act may be held to convey the same meaning. We believe, therefore, that the language of subsection (c) of section 825.107 means merely that the records of the board's proceedings are open to public inspection. It has no applicability to other records of the Teacher Retirement System.

S U M M A R Y

The Teacher Retirement System, as an entity that is authorized by both constitutional and statutory law to invest its securities, may be deemed, with regard to those investments, a "competitor" in the marketplace for purposes of section 3(a)(4) of the Open Records Act, article 6252-17a, V.T.C.S. Whether release of particular information would harm the legitimate marketplace interests of the system requires a showing of the possibility of some specific harm in a particular competitive situation. Here, TRS has made such a showing.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is fluid and cursive, with the first name "Dan" and last name "Morales" clearly distinguishable.

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